

TOLLING AGREEMENT BETWEEN THE UNITED STATES AND ASARCO, INC.
REGARDING ALLEGED CWA AND RCRA VIOLATIONS AT ASARCO'S EAST
HELENA, MONTANA FACILITY

WHEREAS, The United States, on behalf of the United States Environmental Protection Agency ("EPA"), contends that it presently has a cause of action against ASARCO, Inc., for recovery of civil penalties arising from ASARCO's ownership and operation of its East Helena, Montana custom smelter and sulfuric acid plant (the "Facility"). The Facility is described as property located south of the City of East Helena, approximately 5 miles East of the City of Helena, at mailing address PO Box 1230 East Helena, Montana 59635. The cause of action asserted by the United States arises pursuant to Section 307 of the Clean Water Act ("Act"), 33 U.S.C. § 1317, and Section 3008 of the Resource Conservation and Recovery Act ("RCRA), 42 U.S.C. § 6928;

WHEREAS, The United States intended to file a complaint for recovery of civil and criminal penalties and the imposition of injunctive relief pursuant to Section 307 of the Act against ASARCO on or before May, 1996 for operating a source which contributed pollutants into the East Helena Publicly Owned Treatment Works (POTW) in violation of the Non-ferrous Metals Manufacturing Point Source Category found in 40 C.F.R. Part 421;

WHEREAS, The United States intended to file a complaint for recovery of civil penalties and the imposition of injunctive relief pursuant to Section 309(b) and (d) of the Act, 33 U.S.C. § 1319(b) and (d), for violations of Section 301 of the Act, 33 U.S.C. § 1311, at the facility. These violations relate to ASARCO's discharge of pollutants from a point source to a navigable water of the United States without authorization under the National Pollutant Discharge Elimination System ("NPDES") established pursuant to Section 301(a) of

the Act, 33 U.S.C. § 1311(a).

WHEREAS, the United States intended to file a complaint for recovery of civil penalties and the imposition of injunctive relief pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, at the facility. These violations relate to ASARCO's generation and management of hazardous wastes as defined in 42 U.S.C. § 1004.

WHEREAS, Prior to May 1996, ASARCO engaged in negotiations with the United States Attorney for the District of Montana concerning the disposition of criminal allegations under the Act for discharges made by ASARCO's East Helena facility to the East Helena POTW between October 1991 and February 1995. Because of the Department of Justice's policy which defers to criminal proceedings, civil enforcement of the alleged pretreatment violations against ASARCO were deferred;

WHEREAS, Prior to May 1996, the United States and ASARCO have engaged in ongoing negotiations concerning the settlement of NPDES civil violations at the Facility alleged by the United States to have occurred at the Facility between May 1991 and May 1993, RCRA civil violations at the Facility alleged by the United States to have occurred at the Facility after approximately 1991 and for alleged violations arising under other environmental statutes;

WHEREAS, On April 29, 1997, the United States Attorney for the District of Montana and ASARCO agreed upon ASARCO's assertion that civil penalties more appropriately address the discharges which were the subject of the criminal investigation;

WHEREAS, On April 29, 1997, the United States Attorney for the District of Montana informed ASARCO that the matter would be referred to the Department of Justice

for civil prosecution;

WHEREAS, The United States and ASARCO intend to incorporate in and address the civil pre-treatment allegations in their ongoing settlement negotiations concerning the Facility;

WHEREAS, The United States and ASARCO have and are continuing to pursue a negotiated resolution concerning the alleged CWA and RCRA violations at the Facility;

WHEREAS, The United States has agreed to forego the filing of a civil complaint concerning the foregoing alleged violations at the Facility until pre-filing settlement attempts have been exhausted;

WHEREAS, The representatives of the United States and ASARCO certify that they are fully authorized to enter into the terms and conditions of this Agreement, and to execute and bind the United States and ASARCO to this Agreement; and

WHEREAS, The United States and ASARCO acknowledge that the covenants and forbearance under this Agreement constitute adequate and sufficient consideration;

NOW, THEREFORE, The United States and ASARCO stipulate and agree as follows:

1. The time between April 30, 1996 through September 30, 1997, shall not be included in computing the deadline under any statute of limitations that may be applicable to the commencement of an action by the United States against ASARCO under Sections 301, 307 or 309 of the Clean Water Act, 33 U.S.C. §§ 1311, 1317, or 1319; with respect to the Facility.

2. ASARCO agrees not to assert, plead, or raise in any fashion, in any action

hereafter initiated or maintained by the United States, whether by answer, motion, or otherwise, any defense or avoidance based upon the running of the statute of limitations, if any statute of limitations is applicable, or based upon laches or similar defense concerning timeliness of commencing a civil action, pertaining to the time period specified in this Agreement, and ASARCO further agrees that any statute of limitations for CWA and or RCRA violations shall be tolled through September 30, 1997. Except as provided herein, ASARCO expressly reserves the right to raise any otherwise available defense or avoidance available to it at law.

3. The United States reserves the right to initiate a civil complaint relating to this Site if prior to September 30, 1997, in the United States' sole discretion, the United States determines: (a) ASARCO refuses to enter into this agreement; (b) after the effective date of the agreement, settlement discussions with the ASARCO reaches an impasse; or (c) ASARCO has taken any steps which could prejudice the United States' ability to collect a potential judgment from the ASARCO.

4. Except as provided in Paragraph 3, *supra*, the United States agrees not to commence any action on behalf of EPA against the ASARCO under Section 301, 307 or 309 of the Act, 33 U.S.C. §§ 1311, 1317 or 1319, or under Section 3008 of RCRA, 42 U.S.C. § 6928, prior to December 31, 1997, provided, however, that nothing herein shall preclude the commencement of any action necessary to protect the public health, welfare or environment.

5. This Agreement does not constitute an admission of liability on the part of ASARCO to any person (whether or not a party to this agreement) or for any claim whatsoever.

6. This Agreement does not constitute an admission or acknowledgement on the part of the United States that any statute of limitations or equitable defense (including laches) is applicable to current claims of the United States with respect to the Site.

7. This Tolling Agreement between the United States and ASARCO contains the entire agreement between the United States and ASARCO, and no statements, promises, or inducements made by either party or agent of either party that is not contained in this Agreement shall be valid or binding. This Agreement may not be enlarged, modified, or altered except by writing signed by the United States and ASARCO.

8. This agreement may be signed in counterparts, which together shall constitute one and the same agreement.

9. The effective date for this agreement shall be the date upon which it was signed by the Department of Justice for the United States.

FOR THE UNITED STATES:

Date

Robert Homiak, Esq.
Assistant Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C.

FOR ASARCO, INC.

Date
